
***TWOMBLY* AND *IQBAL*: THE INTRODUCTION OF A HEIGHTENED PLEADING STANDARD**

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I. AN OVERVIEW OF *TWOMBLY* AND *IQBAL*

According to the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*,¹ the driving force behind both the *Twombly* and *Ashcroft v. Iqbal*² decisions was the high cost of discovery.³ In *Twombly*, the Court emphasized the high cost of discovery, stating that judicial case management has not been effective in reining in cost.⁴ However, the Court in making its determination, lacked up-to-date empirical data to support its statement.⁵ A recent survey conducted by the Federal Judicial Center ("FJC") surveyed thousands of lawyers on the issue.⁶ The results of the survey revealed that lawyers believed that in the average case, discovery costs are not excessive, but rather are "just the right amount."⁷

The notion of expensive discovery, and the belief that suits lacking merit should be dismissed before such costs are incurred, ini-

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¹ 550 U.S. 544 (2007).

² 129 S. Ct. 1937 (2009).

³ See *Twombly*, 550 U.S. at 558-60.

⁴ See *id.* (recognizing that "it is only by taking care to require allegations that reach the [requisite] level [of plausibility] . . . that we can hope to avoid the potentially enormous expense of discovery").

⁵ See *id.* at 558 (citing cases from the 1960s and 1980s).

⁶ EMERY G. LEE III & THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER: NATIONAL, CASE-BASED CIVIL RULES SURVEY 78 (2009), available at [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf).

⁷ *Id.* at 27.

tiated the movement towards a heightened pleading standard.⁸ This movement, which began in *Twombly*, created a standard of plausibility that required the pleading to consist of “enough fact[s] to raise a reasonable expectation that discovery will reveal evidence” of what is alleged in the complaint.⁹ In determining whether the complaint meets this standard of plausibility, the trial court should not decide the presumption of truthfulness based on conclusory allegations.¹⁰ Further, the Court in *Twombly* held that factual allegations, which are merely consistent with the elements of a claim, are not sufficient to cross “the line between possibility and plausibility.”¹¹ The *Twombly* decision explicitly permits a court to consider inferences that favor the plaintiff as well as inferences that favor the defendant.¹² Therefore, since *Twombly* was decided, courts must weigh the competing inferences at the motion to dismiss stage in order to determine whether the inferences drawn in the plaintiff’s favor are at least as strong, if not stronger, than the inferences drawn in the defendant’s favor.¹³

In *Iqbal*, the Court explicitly stated that a claim is plausible “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”¹⁴ Thus, a court must undertake a two-step analysis in assessing motions to dismiss.¹⁵ First, the court must presume the truth of a well-pleaded factual allegation.¹⁶ Second, the court must

⁸ *Twombly*, 550 U.S. at 558. See also *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984) (“When the requisite elements are lacking, the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint.”).

⁹ *Twombly*, 550 U.S. at 556.

¹⁰ *Id.* at 557. See *Iqbal*, 129 S. Ct. at 1950 (“While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.”).

¹¹ *Twombly*, 550 U.S. at 557.

¹² See *id.* at 556-57. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 129 S. Ct. at 1949.

¹³ *But see Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 336 (2007) (describing that there is one exception where courts do not have to weigh competing inferences).

¹⁴ *Iqbal*, 129 S. Ct. at 1949.

¹⁵ *Id.* at 1949-50.

¹⁶ *Id.* at 1949.

determine whether those facts plausibly give rise to the entitled relief.¹⁷ If the allegations are more likely explained by a lawful, as opposed to an unlawful, action, then the plaintiff's claim will be dismissed.¹⁸ In applying the plausibility standard, the Supreme Court instructed that a "reviewing court [must] draw on its judicial experience and common sense."¹⁹ Requiring a court to make such an inquiry is troublesome because it threatens the predictability of decisions. Every judge has different experiences and thus, different definitions of common sense.

Javaid Iqbal, a Muslim citizen of Pakistan, was arrested on immigration violations after September 11, 2001, and was designated as a person of " 'high interest' to the investigation."²⁰ He was held in highly restrictive conditions and denied contact with other prisoners and the outside world.²¹ While detained, Iqbal was kept in complete lockdown, with the exception of one hour each day when he was allowed to leave his prison cell, but even then he remained in handcuffs and leg irons and was supervised by a four-officer escort.²²

Iqbal alleged that this confinement deprived him of his constitutional rights and he sued the former Attorney General of the United States John Ashcroft and the Director of the Federal Bureau of Investigation ("FBI") Robert Mueller.²³ Iqbal claimed that the defendants adopted an unconstitutional policy that subjected him to the "harsh conditions of confinement" based solely on his religion and national origin.²⁴ The issue before the Court was whether Iqbal's complaint consisted of "factual matter that, if taken as true, states a claim that [Ashcroft and Mueller] deprived him of his clearly established constitutional rights."²⁵

In paragraph forty-seven of the complaint, Iqbal alleged: "[T]he [FBI], under the direction of . . . Mueller, arrested and de-

¹⁷ *Id.* at 1950.

¹⁸ *Id.*

¹⁹ *Iqbal*, 129 S. Ct. at 1950.

²⁰ *Id.* at 1942-43.

²¹ *Id.* at 1943.

²² *Id.*

²³ *Id.* at 1942. "The complaint contends that petitioners designated respondent a person of high interest on account of his race, religion, or national origin, in contravention of the First and Fifth Amendments to the Constitution." *Id.* at 1944.

²⁴ *Id.* at 1942.

²⁵ *Id.* at 1943.

tained thousands of Arab Muslim men, . . . as part of its investigation of the events of September 11.”²⁶ Further, paragraph ninety-six of the complaint stated that the defendants “knew of, condoned, and willfully and maliciously agreed to subject [Iqbal] to these [harsh] conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.”²⁷ The Court disregarded these statements based on its determination that they were merely conclusory allegations.²⁸ In addition, the Court determined that the allegations in paragraphs ten and eleven of the complaint, that “Ashcroft . . . [wa]s a principal architect of the policies” and “Mueller . . . was instrumental in the adoption, promulgation, and implementation of the policies[,]” were conclusory as well.²⁹

The Court based its determination on the fact that these allegations “amount[ed] to nothing more than a ‘formulaic recitation of the elements’ of a constitutional discrimination claim,” and therefore refused to afford them a presumption of truth.³⁰ After eliminating the conclusory allegations, the Court was left to determine the motion to dismiss based on two remaining paragraphs.³¹ According to the Court, the more likely inference drawn from the remaining paragraphs was that the arrests “were likely lawful and justified by [Mueller’s] nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts.”³² The Court concluded that the remaining paragraphs did not plausibly establish that plaintiff’s designation as a high interest detainee was based solely on his religion or national origin.³³

Justice Souter’s dissent, on the other hand, refers to the paragraphs in the complaint eliminated or overlooked by the majority.³⁴

²⁶ First Amended Complaint and Jury Demand at ¶ 47, *Elmaghraby v. Ashcroft*, No. 04 CV 01809, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005).

²⁷ *Id.* ¶ 96.

²⁸ *Iqbal*, 129 S. Ct. at 1951 (stating that because the assertions were bare, “the allegations [we]re conclusory and not entitled to be assumed true”).

²⁹ *Id.*; First Amended Complaint and Jury Demand, *supra* note 26, ¶¶ 10-11.

³⁰ *Iqbal*, 129 S. Ct. at 1951 (quoting *Twombly*, 550 U.S. at 555).

³¹ *Id.*

³² *Id.* at 1951-52.

³³ *Id.* at 1951.

³⁴ *Id.* at 1960-61 (Souter, J., dissenting).

Notably, the dissent looked to paragraphs forty-eight and forty-nine of the complaint which stated that “[m]any of these men . . . were . . . [designated by high-ranking FBI officials] as being of high interest . . . [and] [i]n many cases . . . the classification was made because of the race, religion, and natural origin of the detainees, and not because of any evidence of the detainees’ involvement in supporting terrorist activity.”³⁵ Based on these paragraphs of the complaint, the dissent concluded that if the other allegations relied on by the majority were placed in the context of the complaint as a whole, the Court would have concluded that “Iqbal’s complaint . . . contain[ed] ‘enough facts to state a claim to relief [for intentional discrimination] that is plausible on its face.’”³⁶ The dissent further stated that under *Twombly*, a court is not required to consider the truthfulness of the allegations in the complaint, but rather the judge is required to presume the truthfulness of the allegations regardless of the court’s own skepticism.³⁷ Justice Souter, who wrote the decision for the majority in *Twombly*, dissented in *Iqbal* because he believed that the discarded allegations were not conclusory when viewed in the context of the entire pleading.³⁸ If the Court had considered the aforementioned allegations, it would have concluded that they were sufficient to state a claim and the case would have proceeded.³⁹

Iqbal has been criticized for ignoring the Rules Enabling Act.⁴⁰ The decision inappropriately modified Rule 8 of the Federal Rules of Civil Procedure.⁴¹ To modify an existing rule, a proposal

³⁵ *Id.* at 1959 (quoting First Amended Complaint and Jury Demand, *supra* note 26, ¶¶ 48-49).

³⁶ *Id.* at 1960-61 (quoting *Twombly*, 550 U.S. at 570).

³⁷ *Id.* at 1959. See *Twombly*, 550 U.S. at 555 (stating that a court must consider a motion to dismiss “on the assumption that all the allegations in the complaint are true (even if doubtful in fact)”).

³⁸ *Iqbal*, 129 S. Ct. at 1960-61 (Souter, J., dissenting) (“The fallacy of the majority’s position . . . lies in looking at the relevant assertions in isolation. . . . Viewed in light of the[] subsidiary allegations, the allegations singled out by the majority as ‘conclusory’ are no such thing.”).

³⁹ *Id.* at 1961 (stating that “there is no principled basis for the majority’s disregard of the allegations linking Ashcroft and Mueller to their subordinates’ discrimination”).

⁴⁰ See 28 U.S.C.A. § 2072 (West 2011) (prescribing a specific process for altering procedural rules).

⁴¹ Compare FED. R. CIV. P. 8(a)(2) (requiring that a pleading contain “a short and plain statement of the claim showing that the pleader is entitled to relief”), with *Iqbal*, 129 S. Ct. at 1949 (requiring that the pleading “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face’” (quoting *Twombly*, 127 S. Ct. at 570)).

must go through the Advisory Committee on Civil Rules, which allows for a period of public comment, then the Standing Committee on the Rules, then the full Judicial Conference, then the Supreme Court, and lastly Congress.⁴² This process was ignored by the Supreme Court, presumably because the Court believed that this process would not achieve the amendment of Rule 8 that it desired.

Another criticism of the *Iqbal* decision is that requiring courts to determine what constitutes a fact, a conclusion, a legal conclusion, and evidence is subjective and unpredictable.⁴³ As a result, these decisions are often arbitrary and are potentially based on the judges' cultural biases.

II. EMPIRICAL FINDINGS POST-*TWOMBLY* AND *IQBAL*

In her article, "*The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*," Patricia Hatamyar described the results of a database she created in which she tracked a total of 1200 cases, selected at random.⁴⁴ The studied cases consisted of 500 cases for two years prior to *Twombly*, 500 cases for two years post-*Twombly*, and 200 for the four months post-*Iqbal*.⁴⁵ Notably, forty-six percent of motions to dismiss were granted before *Twombly*.⁴⁶ After *Twombly*, forty-eight percent were granted.⁴⁷ After *Iqbal*, fifty-six percent were granted—a significant rise.⁴⁸ Factoring in leave to amend a complaint, six percent granted motions to dismiss with leave to amend before *Twombly*, nine percent after *Twombly*, and nineteen percent after *Iqbal*.⁴⁹ This is a three-fold increase.⁵⁰

⁴² See *The Rule Making Process*, U.S. COURTS, <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess.aspx> (last visited Mar. 6, 2011).

⁴³ See, e.g., *Iqbal*, 129 S. Ct. at 1959 (Souter, J., dissenting) (taking the position that the mentioned provisions were sufficient factual allegations, rather than siding with the majority's holding that they were mere conclusions).

⁴⁴ See Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 555 (2010). The purpose of the study was to "empirically demonstrate[] that district courts ruled much differently on 12(b)(6) motions after *Twombly*." *Id.*

⁴⁵ *Id.* at 585.

⁴⁶ *Id.* at 599.

⁴⁷ *Id.* at 602.

⁴⁸ Hatamyar, *supra* note 44, at 602.

⁴⁹ See *id.* at 598.

⁵⁰ See *id.*

Regarding the rates of denying motions to dismiss, plaintiffs succeeded twenty-six percent of the time under *Conley v. Gibson*,⁵¹ twenty-three percent under *Twombly*, and eighteen percent under *Iqbal*, which is a significant decline.⁵² The study also provided a breakdown of the different rates of granting motions to dismiss by subject matter.⁵³ In Hatamyar's database, motions to dismiss were granted in an average of forty-nine percent of these cases, but the grants fell above or below that average based on the type of case.⁵⁴ For the classic kinds of cases—contracts, intellectual property, and ERISA—the rates were way below the average of forty-nine percent.⁵⁵ The percentages were thirty-three, thirty-three, and thirty-nine, respectively.⁵⁶ However, cases involving constitutional civil rights, age discrimination, labor, and consumer credit law were in the fifty to sixty percent range.⁵⁷ In addition, differences among the circuits have also been observed—for example, the D.C. Circuit granted motions to dismiss sixty-seven percent of the time, the Second Circuit sixty percent of the time, and the Eleventh Circuit thirty-one percent of the time.⁵⁸ Similarly striking is that post-*Iqbal*, eighty-five percent of the motions regarding pro se plaintiffs were dismissed.⁵⁹ However, in the *Conley* days, only sixty-seven percent were dismissed.⁶⁰

III. PRACTICAL RAMIFICATIONS OF *TWOMBLY* AND *IQBAL*

Under *Twombly* and *Iqbal*, the questions that a judge must first consider are whether an allegation is conclusory, and then whether it must be accepted as true.⁶¹ In practice, these are always difficult determinations often resulting in a very close call. Thus, it may be appropriate for a judge to err on the side of finding an allega-

⁵¹ 355 U.S. 41 (1957).

⁵² Hatamyar, *supra* note 44, at 598.

⁵³ *Id.* at 627-28.

⁵⁴ *See id.*

⁵⁵ *See id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 627-28 (noting percentages of fifty-three percent, fifty-three percent, sixty percent, and fifty-nine percent, respectively).

⁵⁸ *Id.* at 631.

⁵⁹ *Id.* at 633.

⁶⁰ *Id.*

⁶¹ *Iqbal*, 129 S. Ct. at 1950.

tion to state a fact rather than a conclusion. The benefit of the doubt should go to the pleader and allow the pleading to go forward. Based on this reasoning, many courts are allowing close cases to proceed under the *Iqbal* standard.⁶² Judges may also be granting leave to amend more frequently, thereby doubling their workload and that of the parties.⁶³

In the past, under *Conley*, the courts were required to presume that all of the allegations in the complaint were true, even if the court was highly skeptical.⁶⁴ *Conley* thus provided a clear standard. Today, courts must weigh the inferences at the pleading stage with little or no discovery.⁶⁵ As a result, a judge's job is much more difficult and the results are inconsistent.

Judges now must draw inferences in favor of both sides.⁶⁶ This balancing test requires the court to draw inferences on the defense's behalf, without the benefit of a defense pleading. The process, overall, has created a new phenomenon: the motion to dismiss has become akin to summary judgment, while summary judgment has become akin to a trial. Indeed, the number of civil cases in federal court that proceed to trial has plummeted from 11.5% in 1962 to 1.8% in 2002.⁶⁷

A legislative fix is highly unlikely. Nonetheless, proposals have been made to return to the Rule 8 standard articulated in *Con-*

⁶² See Geoffrey A. Mort, 'Iqbal's' Application in Employment Law Cases in the Second Circuit, N.Y. L.J., Jan. 20, 2011, available at <http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202478511106&rss=nylj&slreturn=1&hblogin=1#>.

⁶³ See Hatamyar, *supra* note 44, at 556 ("[T]he rate at which such motions were granted increased from *Conley* to *Twombly* to *Iqbal*, although grants with leave to amend accounted for much of the increase.").

⁶⁴ See *Conley*, 355 U.S. at 45-46. The Court set forth its famous "no set of facts" language:

In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Id. (emphasis added).

⁶⁵ See *Twombly*, 550 U.S. at 566-67 (demonstrating such weighing by comparing the potential inference that the defendants conspired against the inference that they did not conspire).

⁶⁶ See *id.* (acknowledging inferences in support of both the defendant and the plaintiff).

⁶⁷ See Patricia Lee Refo, *The Vanishing Trial*, A.B.A. LITIG. J., Winter 2004, at 2, available at <http://www.abanet.org/litigation/home.html>.

ley.⁶⁸

⁶⁸ *See, e.g.*, Notice Pleading Restoration Act of 2010, S. 4054, 111th Cong. (2010) (“[The purpose of this Act is t]o restore the law governing pleading and pleading motions that existed before the decisions of the Supreme Court of the United States in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S Ct. 1937 (2009).”); Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009) (“[The purpose of this Act is t]o amend title 28, United States Code, to provide a restoration of notice pleading in Federal courts, and for other purposes.”).